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STERNE, KESSLER, GOLDSTEIN & FOX P.L.L.C. 1100 NEW YORK AVE., N.W. WASHINGTON, DC 20005			CASTELLANO, STEPHEN J	
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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 09/491,639  
Filing Date: January 27, 2000  
Appellant(s): BLUCHER, TIMOTHY L.

MAILED  
JUN 09 2005  
Group 3700

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Michael B. Ray  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the brief on appeal filed May 16, 2005.

**(1) Real Party in Interest**

A statement identifying by name the real party in interest is contained in the brief.

**(2) Related Appeals and Interferences**

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(3) Status of Claims**

The statement of the status of claims contained in the brief is correct.

**(4) Status of Amendments After Final**

The appellant's statement of the status of amendments after final rejection contained in the brief is incorrect.

No amendment after final has been filed.

**(5) Summary of Claimed Subject Matter**

The summary of claimed subject matter contained in the brief is correct.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The appellant's statement of the grounds of rejection is substantially correct. The changes are as follows:

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Ground 2 is more accurately stated as:

Claims 1-5, 9, 30-35, 38, 42-48, 52-59 and 63 are rejected under 35 U.S.C. 103(a) as being unpatentable over Binks in view of Geigel and Van Erden et al. (Van Erden).

Ground 3 is more accurately stated as:

Claims 11, 28, 29 and 39-41 are rejected under 35 U.S.C. 103(a) as being unpatentable over Binks in view of Geigel and Van Erden as applied to claim 1 and 38 above, and further in view of the M & Q Plastic Products Brochure (the M & Q brochure).

Ground 4 is more accurately stated as:

Claims 1-5, 9, 11, 28-35, 38-48, 52-59 and 63 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ibsch or Ferlanti in view of Geigel, Van Erden and the M & Q brochure.

#### **(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

#### **(8) Evidence Relied Upon**

The following is a listing of the evidence (e.g., patents, publications, Official Notice, and admitted prior art) relied upon in the rejection of claims under appeal.

##### **Patents:**

4,828,134	Ferlanti	05-1989
4,759,642	Van Erden et al.	07-1988
4,320,699	Binks	03-1982

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3,357,152	Geigel	12-1967
2,542,413	Ibsch, Jr.	02-1951

**Publications:**

M & Q Plastic Products Brochure dated 1995, six pages.

**(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

The rejections are repeated verbatim as stated in final rejection mailed February 16, 2005.

1. Claims 38, 42-45 and 53-56 rejected under 35 U.S.C. 102(b) as being anticipated by Binks.

Binks discloses a pan liner system comprising a pan and a liner (see Fig. 2) made of polytetrafluoroethylene (TFE or TEFLON) which is a polymeric material capable of withstanding a temperature of at least about 400 degrees F, the polymeric material is formed in the shape of a bag (as shown in Fig. 2 wherein the material is in close contact with the inside contours of the pan) having side edges (the edges that correspond to the junction of two side walls) and a contoured bottom edge (the bottom edge that corresponds to the juncture of a side wall and the bottom), the bottom edge having a single central edge (the central 1/3 portion of the bottom edge that consists of 1/3 of the bottom edge in the middle of two end 1/3 portions on each of its ends) and two contoured edge portions (the two end 1/3 portions), each of said contoured edge portions extending outwardly from one end of the single central edge and joined to one of

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said side edges, whereby said contoured edge portions substantially eliminate entrapment of food occurring in corners of bags lacking said contoured edge portions.

2. Claims 1-5, 9, 30-35, 38, 42-48, 52-59 and 63 are rejected under 35 U.S.C. 103(a) as being unpatentable over Binks in view of Geigel and Van Erden et al. (Van Erden).

Binks discloses a pan liner system for forming an improved barrier between a pan and food disposed therein, the system comprising: a pan (11) and a drop-in polymeric (polytetrafluoroethylene (TFE)) pan liner (10) having a contour fit, the pan having a bottom panel and four side walls and a pan top opening and the liner having a wavy shape and somewhat resistant to conformance to the confronting surfaces of the pan when cold, when heated the liner becomes substantially limp and intimately hugs the surface of the pan as shown in Fig. 2 (see column 5, lines 50-64 and column 6, lines 31-52). Binks discloses the invention except for the contoured bottom edge configuration.

Geigel teaches a bag having a contoured bottom edge with a flat bottom edge which is joined to two straight tapered edges having a predetermined angle with respect to the bottom edge of between 40 and 55 degrees. Van Erden teaches a liner having a contoured bottom edge with a flat bottom edge which is joined to two straight tapered edges having a predetermined angle with respect to the bottom edge of between 40 and 55 degrees. It would have been obvious to modify the shape of the Binks liner to have the flat bottom edge and two straight tapered edges motivated by the elimination of the tendency to snag and improved stackability while avoiding the more cumbersome procedures of gusseted bag manufacture and motivated by the freeing of

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the two bottom corners of the bag from interfering with easy reception and packing of the filled bag in a fairly close fitting carton.

3. Claims 11, 28, 29, 39, 40 and 41 are rejected under 35 U.S.C. 103(a) as being unpatentable over Binks in view of Geigel and Van Erden as applied to claims 1 and 38 above, and further in view of the M & Q Plastic Products Brochure (the M & Q brochure).

The combination discloses the invention except for the polyamide or polyester material with a 13,000 p.s.i. tensile strength and which is non-blocking. The M & Q brochure teaches a high temperature nylon (polyamide) resin material for bags used in food applications which can withstand temperatures of 400 degrees F, has 13,000 p.s.i. tensile strength and is non-blocking. It would have been obvious to replace the liner material of Ibsch or Ferlanti with the high temperature nylon resin in order to provide a material which is stronger per weight with at least 13,000 p.s.i. to withstand tearing and breaking when liners are manipulated and which can withstand temperatures of 400 degrees F to ensure heat resistance for cooking.

For claim 41, polyesters having high strength and high temperature resistance such as liquid crystal polymer are well known. It would have been obvious to modify the liner material of the combination to be polyester and specifically liquid crystal polyester in order to provide a material which is stronger per weight with at least 13,000 p.s.i. to withstand tearing and breaking when liners are manipulated and which can withstand temperatures of 400 degrees F to ensure heat resistance for cooking. It also would have been obvious to modify the nylon to be a nylon-polyester blend in order to add strength to the nylon resin in order to resist puncture and breaking of the liner.

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4. Claims 1-5, 9, 11, 28-35, 38-48, 52-59 and 63 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ibsch or Ferlanti in view of Geigel, Van Erden and the M & Q Plastic Products Brochure (the M & Q brochure).

Ibsch discloses a pan liner system comprising a pan (10) with a bottom panel and a sidewall extending upwardly from the bottom panel and a pan liner (the bottom layer of the plurality of laminations 14) having a contoured fit disposed within the pan to cover an interior surface of the pan, the pan liner including a contoured bottom edge (the circular edge that circumscribes the flat bottom), a flexible sidewall extending upwardly from the bottom end (16), an open top end extending upwardly beyond the top edge of the pan's sidewall and being folded over the pan's top edge (17, 18), the pan liner not having dog ears.

Ferlanti discloses a pan liner system comprising a pan (12) with a bottom panel and a sidewall extending upwardly from the bottom panel and a pan liner (10) (the bottom layer of the plurality of laminations) having a contoured fit disposed within the pan to cover an interior surface of the pan, the pan liner including a contoured bottom edge, a flexible sidewall extending upwardly from the bottom end, an open top end extending upwardly beyond the top edge of the pan's sidewall and being folded over the pan's top edge, the pan liner not having dog ears. The pan liner (10) is made from a material comprising plastic and is made of metal with a polytetrafluoroethylene (TEFLON) film (see col. 3, lines 26-33). Regardless of the unsuitability of some plastics as mentioned in column 1, it seems that Ferlanti is rather clear that plastic is quite suitable. Polytetrafluoroethylene is neither fragile or likely to ignite.



Ibsch and Ferlanti disclose the invention except for the configuration of the contoured bottom edge, the liner isn't a single drop-in type and the liner material isn't high temperature plastic material, with a 13,000 p.s.i. tensile strength which is non-blocking.

Geigel teaches a bag having a contoured bottom edge with a flat bottom edge which is joined to two straight tapered edges having a predetermined angle with respect to the bottom edge of between 40 and 55 degrees. Van Erden teaches a liner having a contoured bottom edge with a flat bottom edge which is joined to two straight tapered edges having a predetermined angle with respect to the bottom edge of between 40 and 55 degrees. It would have been obvious to modify the shape of the liner to have the flat bottom edge and two straight tapered edges motivated by the elimination of the tendency to snag and improved stackability while avoiding the more cumbersome procedures of gusseted bag manufacture and motivated by the freeing of the two bottom corners of the bag from interfering with easy reception and packing of the filled bag in a fairly close fitting carton.

The M & Q brochure teaches a high temperature nylon resin material for bags used in food applications which can withstand temperatures of 400 degrees F, has 13,000 p.s.i. tensile strength and is non-blocking. It would have been obvious to modify the liner material of Ibsch or Ferlanti with the high temperature nylon resin liner in order to provide a material which is stronger per weight with at least 13,000 p.s.i. to withstand tearing and breaking when liners are manipulated and which can withstand temperatures of 400 degrees F to ensure heat resistance for cooking.

For claim 41, polyesters having high strength and high temperature resistance such as liquid crystal polymer are well known. It would have been obvious to modify the liner material

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of the combination to be polyester and specifically liquid crystal polyester in order to provide a material which is stronger per weight with at least 13,000 p.s.i. to withstand tearing and breaking when liners are manipulated and which can withstand temperatures of 400 degrees F to ensure heat resistance for cooking. It also would have been obvious to modify the nylon to be a nylon-polyester blend in order to add strength to the nylon resin in order to resist puncture and breaking of the liner.

#### **(10) Response to Argument**

##### **Determination of Non-Invoking of 112, Sixth Paragraph**

Appellant states in part V, Summary of Claimed Subject Matter, section F. that claim 53 is presented in means-plus-function form. Appellant further states that the examiner's determination that 112, sixth paragraph hasn't been invoked is contrary to established law. Appellant's analysis fails to specify where the examiner has erred by following well established MPEP practice as it relates to the determination of whether means-plus function limitations properly invoke 112, sixth paragraph as stated in MPEP sections 2181-2185.

The determination as stated in the final Office action mailed February 16, 2005 is as follows:

The means-plus-function limitations of "pan means for holding" and "contoured bottom edge means for providing a sealed bottom" do not invoke 112, sixth paragraph since the third prong of the three part test is not met. The third part of this test states "the phrase 'means for' ... must not be modified by sufficient structure, material or acts for achieving the specified

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function.” The means for holding is modified by “pan” and provides sufficient structure for achieving the function. The means for providing a sealed bottom is modified by “contoured bottom edge” that seals and provides sufficient structure for achieving this function.

### **102 Rejection**

Appellant states that the flat sheet liner of the invention can't anticipate a liner formed in the shape of a bag. It is clear that the liner is flat before it is placed in the interior cavity of the pan. However, the specification contains extreme detail of how the liner is laid within the pan, that heating the pan and liner softens the liner and pushes out air trapped between the pan and liner, and the liner enters into intimate hugging contact to the pan bottom under content loads (see col. 1, lines 40-48, col. 2, lines 15-24 and line 40, col. 4, lines 34-37, 42-47 and 50-56, col. 5, lines 18-24 and lines 55-64, col. 6, lines 35-45, col. 9, lines 13-23, 36-41 and 55-60, col. 10, lines 49-55 and col. 12, lines 1-3, 14-16, 24-25 and 45-52). Therefore, the liner achieves a contour almost exactly like the upper surface of the pan with a flat bottom and four, flat upwardly extending walls. The contoured edge portions fall at the folds between the bottom wall and the side walls and the folds between the adjacent side walls. It is not understood how this doesn't form the shape of a bag.

Appellant would have the Board believe that the liner is only of a flat condition. This is contrary to the very detailed teachings within Binks. Appellant has improperly ignored the teachings of Binks.

Even if it is determined that the “to conform intimately to the heated cooking surface especially under load of material” disclosure of Binks (see col. 4, lines 42-44) is accomplished

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with a few wrinkles or creases, this still forms a bag within the accepted definition of the term “bag.” It has been observed that appellant’s liner as demonstrated with models during interviews conducted during prosecution doesn’t exactly conform to the surfaces of the pan and fits with wrinkles, creases and other spaces due to the variations between the contours of the pan and the contours of the liner.

Appellant assumes the definition of the word “contoured” is “arcuate or curved.” The plain and ordinary meaning of “contoured” is broader and encompasses straight or linear edges and combinations of linear edges as well as arcuate and curved edges. Appellant has not further defined the term “contoured” within the written specification to be limited to only arcuate or curved.

### **103 Rejections**

Regarding the Binks in view of Geigel and Van Erden rejections as this rejection pertains to claims 38, 42-45 and 53-56 (claims already rejected as anticipated by Binks), the only lacking structure between Binks and the disclosed invention may be in that the depth of the bag of the disclosed invention is deeper than that of Binks. Also, the contour of the disclosed invention is different than that shown in Binks. Neither the depth of the bag or the specific contour of the bag’s bottom edge is claimed sufficiently to distinguish these characteristics. This rejection has been made in an attempt to appease an appellant reluctant to further limit his claims. This rejection has been made in the event that appellant persuades the Board that the word “contoured” has a meaning other than its plain and ordinary meaning.

Applicant mentions that the examiner uses hindsight in rejecting the claims as being unpatentable under section 103. How does applicant know that the examiner didn't make this rejection previously as in another case, a situation of foresight rather than hindsight, wherein the rejection was made before appellant filed? There doesn't seem to be any basis for this remark in that it speculates a timeline wherein the rejection occurred after the present application was filed. Appellant offers no proof that the rejection was made only after the present application was filed.

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

Appellant mentions that motivation is lacking. Appellant states that the key problem solved is the elimination of food in corners of the bag. Appellant accomplishes this by cutting the corners and sealing the corners. The secondary references solve a different problem of excess liner material which causes a tendency to snag, a need to provide complex gusseting, and interference of the bottom corners of the bag within a carton. The solution is the same accomplished by cutting the corners and sealing the corners. It doesn't matter that a different problem is solved, the result is that it is obvious for a different reason to solve a different problem to cut and seal the corners. The motivation is proper.

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Appellant assumes the definition of the word “contoured” is “arcuate or curved.” The plain meaning of “contoured” is broader and encompasses straight or linear edges and combinations of linear edges as well as arcuate and curved edges. Appellant has not further defined the term “contoured” within the written specification to be limited to only arcuate or curved.

Regarding the addition of the M & Q brochure, appellant doesn’t set forth any additional argument other than what has been stated previously.

Regarding the rejection which uses Ibsch and Ferlanti, appellant appears confused when stating that six references are being combined. Five references are mentioned. As few as two references could render some or most of appellant’s claims unpatentable. Appellant mentions that liners are stacked in Ibsch and Ferlanti. No claim language precludes stacked liners.

### **Declarations**

Appellant states that the evidence (declarations) have been ignored by the examiner. Appellant’s statement is inaccurate. The examiner has responded to appellant’s declarations in a timely and consistent manner.

### **Druin Declarations**

The declarations submitted March 3, 2003 and January 28, 2005 are insufficient to overcome the 103 rejections. The declarations fail to set forth sufficient facts. Dr. Druin statements with respect to the applied references are conclusionary and lack sufficient evidence to support his statements. Dr. Druin may be an expert in the field of plastic conversion industry,

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however, he is not an expert in the fields related to the applied references or in the field of patent prosecution. Dr. Druin is a paid consultant and has a financial interest in his association with M & Q Plastic Products, Inc.

### **Blucher Declarations**

The declarations submitted February 6, 2004 and January 28, 2005 are insufficient to overcome the 103 rejections. Mr. Blucher provides evidence in the form of testimonials, charts, sales documents and advertisements. However, this evidence doesn't demonstrate or prove commercial success, unexpected results, long-felt but unresolved needs, failure of others, or skepticism of experts. The chart presented as Exhibit C doesn't set forth a comparison of the sales of pan liners with dog ears or non-contour fit pan liners to sales of liners without dog ears or contour fit pan liners, it appears the chart's figures represent total sales of both types of pan liners. There is evidence of a substantial increase in marketing during the sale of the contour fit pan liners. The declaration provides a nexus or connection between applicant's invention and claims 38, 42 and 53. Claims 38, 42 and 53 read on the non-contour fit pan liners (with dog ears) and have been rejected under Rule 102 as being anticipated. The anticipatory rejection can not be overcome by any amount of evidence.

In some cases, the testimonial letter reference the fact that applicant solicited or requested the testimonial letters.

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For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

  
Stephen Castellano

Conferees:

Lee W. Young  


Nathan J. Newhouse  
